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FINAL REPORT ON U.S. EPA REVIEW OF OHIO ENVIRONMENTAL PROGRAMS

I. INTRODUCTION

This final report summarizes the United States Environmental Protection Agency's (U.S. EPA) findings and conclusions from its review of the implementation by the Ohio Environmental Protection Agency (Ohio EPA) of eight federally authorized, delegated or approved environmental programs that four environmental groups petitioned U.S. EPA to withdraw or revoke.¹ As supplemented and amended, the petition asks U.S. EPA to withdraw its authorization, delegation or approval of Ohio EPA's Resource Conservation and Recovery Act (RCRA) hazardous waste program and solid waste permit program; Clean Water Act National Pollutant Discharge Elimination System (NPDES) program; and Clean Air Act Standards of Performance for New Stationary Sources (NSPS), New Source Review (NSR), Prevention of Significant Deterioration (PSD), non-compliance penalties, and Title V permit programs. Because the petition seeks withdrawal of those programs, the focus of this report is whether it is appropriate to initiate withdrawal proceedings based on the withdrawal criteria for each of the affected programs.

The petition, submitted by D. David Altman on behalf of Ohio Citizen Action, the Ohio Environmental Council (which was later replaced by the Ohio Public Interest Research Group (PIRG)), Rivers Unlimited, and the Ohio Sierra Club, originally requested U.S. EPA to withdraw certain air, water and waste environmental programs based on the Ohio Environmental Audit Privilege and Immunity Law (the Audit Law); but was supplemented and amended on September 18, 1998, August 4, 1999, and January 27, 2000, to add allegations about how the Ohio EPA was implementing the programs identified in the first paragraph above. In response to the implementation allegations, starting in January 2000, U.S. EPA conducted a comprehensive review of those programs. U.S. EPA also considered affidavits submitted by the petitioners in late summer of 2000. U.S. EPA denied the component of the petition that alleged legal authority issues associated with the Audit Law on December 21, 2000,² but continued its review of the

implementation allegations. U.S. EPA reviewed how Ohio EPA implemented the affected

¹For ease of reference in this report, U.S. EPA will refer to the terms: 1) "withdraw or revoke" as "withdraw;" 2) "withdrawal or revocation" as "withdrawal;" and 3) "initiate withdrawal or revocation proceedings" as "initiate withdrawal proceedings," respectively.

²As discussed in the December 21, 2000 petition denial letter addressed to D. David Altman, the July 1998 amendments to the Audit Law together with the interpretations of the unamended portions of the Audit Law provided by the Ohio Attorney General, and Ohio EPA's commitment on the use of stipulations addressed U.S. EPA's legal concerns with Ohio's Audit Law regarding authorized or approved federal programs in Ohio.

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programs during the period from 1995 to 2000.

On September 4, 2001, U.S. EPA made public a preliminary report, dated August 30, 2001, entitled “Draft Report on U.S. EPA Review of Ohio Environmental Programs” (Draft Report) summarizing the petitioners’ allegations and setting forth its preliminary findings with respect to the request for withdrawal of the eight environmental programs. The Draft Report also made recommendations that, if implemented, would alleviate concerns related to withdrawal criteria and obviate the need for further review. U.S. EPA held two public meetings in Columbus, Ohio on November 13, 2001, to answer questions and take comments on the report. U.S. EPA accepted comments from the public until January 14, 2002. U.S. EPA also followed up with Ohio EPA on the recommendations made in the Draft Report.

The discussion below summarizes U.S. EPA’s findings and conclusions for each statute governing programs covered by the petition and for Ohio’s enforcement offices. U.S. EPA has also prepared background documents for each program, containing more detailed discussions of the findings; and a responsiveness summary addressing the comments received at the public meetings and during the public comment period.

As discussed below, U.S. EPA did not find sufficient evidence to justify withdrawal of the programs covered by the petition. With respect to Ohio EPA’s Clean Air Act Title V program, U.S. EPA issued a notice of deficiency (NOD) to Ohio on April 10, 2002 (*See* 67 Fed. Reg. 19175, April 18, 2002) for inappropriately permitting insignificant emission units and for limiting prompt and six-month reports of deviations to those detected through compliance methods specified in Title V permits. U.S. EPA addressed a number of other Title V issues in a May 22, 2002 letter responding to citizen comments on Ohio EPA’s Title V program. Ohio EPA and two industry groups filed petitions for review of the NOD in the United States Court of Appeals for the Sixth Circuit. Ohio PIRG filed a petition for review of U.S. EPA’s May 22, 2002 letter before the same court. Given the pending litigation, U.S. EPA is not making any final findings on these issues in this report.

II. CLEAN AIR ACT

A. INTRODUCTION

The petitioners requested U.S. EPA to withdraw its approval or delegation of the following five Ohio Clean Air Act (CAA) programs: Title V permitting (Title V), New Source Review (NSR), Prevention of Significant Deterioration (PSD), Non-compliance Penalty, and Performance Standards for New Stationary Sources (NSPS). U.S. EPA conducted independent reviews of Ohio’s air permitting and enforcement programs gathering information from a variety of sources in early 2000, including on-site visits to Ohio EPA statewide and district offices and local air agencies. U.S. EPA considered information in the petition, affidavits, public comments, reports

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and records summarizing statewide data, and audit reports.

The CAA portion of the Draft Report applied the withdrawal criteria of the various programs to the preliminary findings. Where U.S. EPA identified concerns in its preliminary findings, it recommended that Ohio EPA take corrective action. After issuing the Draft Report, U.S. EPA met with Ohio EPA to discuss the report, Ohio EPA's comments, and potential corrective actions or changes to procedures used at Ohio EPA. Based on the assessment of the additional information, many of U.S. EPA's final findings are different from the preliminary findings.

B. ENFORCEMENT FINDINGS

1. Resources

While the Draft Report found that Ohio EPA employed fewer employees than it had indicated it would need to run its air programs, the data U.S. EPA relied upon did not account for local agency employees who carry out many of the air enforcement duties in Ohio. U.S. EPA's final finding is that the number of employees at Ohio EPA and local agencies assigned to air programs is not significantly different than the number Ohio EPA stated it would need to run its air programs.

2. Inspection and Monitoring

Ohio EPA and U.S. EPA have spent considerable time reconciling data on the number of air inspections conducted in Ohio. Inspection numbers reported by Ohio after the issuance of the Draft Report show that substantially more inspections occurred than reported in the Draft Report. Although the trend in the number of inspections was generally downward between 1996 and 1999, more recent data received from Ohio EPA indicate that inspections increased between 1999 and 2000. Moreover, Ohio EPA's current inspection projections are consistent with minimum inspection frequencies recommended in U.S. EPA's 2001 compliance monitoring strategy policy. In its FY 2003 air grant application, Ohio EPA committed to an inspection program focusing on the use of more thorough inspections known as full compliance evaluations.

3. Enforcement Activity and Penalties

By the end of 2001, Ohio EPA reported resolution of all but one of its administrative cases that would have been two years old in December 2001. With respect to penalties, recent data indicate that, after a decline in total penalties in 2000, there was a substantial increase in administrative penalties in 2001 and an increase in total penalties assessed by the Ohio EPA and the Ohio Attorney General's Office combined in 2001.

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4. Authority to Implement Portions of the Delegated NSPS and NESHAPs Programs

Ohio EPA has proposed revisions to its asbestos regulations to align them with the federal regulations. U.S. EPA will address Ohio EPA's lack of enforcement authority for the residential wood heater NESHAP when it revises the Ohio NESHAP delegation agreement later this year.

5. Identifying PSD Sources

Ohio EPA noted a number of activities it uses to identify sources subject to PSD requirements. Further, Ohio EPA has committed to improve its inspection form and instructions for its inspectors to provide a more explicit system to identify undetected PSD sources. It is also developing PSD guidance for inspectors, and is providing NSR training courses. In addition, in its FY 2003 air grant application, Ohio EPA committed to an inspection program focusing on the use of full compliance evaluations, which are more likely to identify process changes that would trigger PSD applicability.

6. Verification of Regulated Entities' Statements

Ohio EPA developed and implemented a checklist for reviewing certain reports submitted by companies that have Title V permits. Ohio EPA also committed to implement full compliance evaluations which U.S. EPA expects will help verify the accuracy of some statements made by companies. Ohio EPA committed to use a revised inspection form which focuses more on activities that verify the accuracy of reports that companies have submitted to Ohio EPA.

7. Training

Ohio EPA solicited comments on a draft description of the minimum training curriculum for new entry level employees. After Ohio EPA finalizes the training curriculum, Ohio EPA will require its central and field offices to implement the curriculum. In addition, Ohio EPA has implemented a basic NSR training course for its staff, and is developing an advanced NSR training course planned to be held this year.

8. Title V Monitoring and Source Compliance Plan

At present, Ohio EPA has not submitted its criteria for monitoring source compliance as part of its Title V program. It should be noted, however, that Ohio EPA is implementing an acceptable compliance monitoring strategy, which will address full compliance evaluations for Title V facilities, as described in its FY 2003 grant workplan.

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9. Vacancies

U.S. EPA agrees with Ohio EPA that vacancy rates alone do not show whether the agency has sufficient experienced staff. U.S. EPA finds that vacancy rates alone are not an accurate measure of program effectiveness for purposes of reviewing Ohio EPA's program against the CAA withdrawal criteria.

10. Maximum Achievable Control Technology, Regulation Application and Audit Privilege

With respect to allegations on identifying sources subject to MACT, proper application of environmental regulations, and the Audit Law, U.S. EPA reviewers did not find Ohio EPA enforcement deficiencies significant enough to incorporate into U.S. EPA's findings with respect to withdrawal proceedings. As discussed in a December 21, 2000 letter from U.S. EPA to D. David Altman, Ohio resolved legal concerns with the impact of its Audit Law upon authorized, delegated, and approved program requirements through statutory interpretations and amendments.

11. Public Involvement

Allegations regarding exclusion of citizens from discussions with regulated entities, excessive copying charges, disparate treatment of representations made by companies and citizens, and citizen input into the enforcement process do not constitute grounds for withdrawal of a federally delegated or approved Ohio program because the allegations pertain to an area where Ohio has discretion in shaping its enforcement processes.

C. PERMITTING FINDINGS

U.S. EPA permitting reviewers investigated issues pertaining specifically to Ohio's Title V, PSD, NSR, and NSPS permitting programs, as well as some broader Ohio EPA programmatic issues affecting all of these programs.

1. Permitting Findings Regarding Title V Permits

a. Permit Issuance Rate

The Draft Report indicated that as of April 2001, Ohio EPA had issued final permits for only 30 percent of the Title V permit applications it had received, although it had provided draft Title V permits for public comment for over 72 percent of the Title V applications. On March 15, 2002, Ohio EPA committed in writing to a schedule to issue all permits by September 1, 2003. U.S. EPA's cited this schedule and commitment in a May 22, 2002 letter responding to citizen

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comments on Ohio EPA's Title V program. Ohio EPA then met its June 1, 2002, and January 1, 2003 milestones for permit issuance, and as of January 2003, Ohio EPA had issued 75 percent of its initial Title V permits. Given the pending litigation, as discussed in section I above, U.S. EPA is not making a final finding on permit issuance in this report.

b. Inclusion of Applicable Requirements in Permits.

The same Ohio EPA personnel who inspect a source and write its permit to install (PTI) and permit to operate (PTO) review that source's Title V permit application and draft the Title V permit. Based on this system, U.S. EPA believes that Ohio EPA is including in Title V permits those applicable requirements that it has identified under its PTI and PTO programs. The permitting reviewers did not investigate whether Ohio EPA, when reviewing Title V permit applications, detects sources subject to requirements not identified through its PTI and PTO programs. This is because such detection is done more effectively through enforcement activities than through the permit review process. The enforcement portion of this review addresses this issue.

c. Content of Permits

U.S. EPA raised the following issues on Ohio EPA's draft Title V permits that, if unresolved, would result in U.S. EPA objecting to the permits: the federal legal status of superseded construction permits, Ohio's assertion that best available technology regulations are state-enforceable only, and the lack of an adequate statement of basis in many Title V permits. Since U.S. EPA raised the issue of superseded construction permits in its May 18, 1998 letter to Ohio EPA, U.S. EPA has not identified any Ohio EPA draft Title V permit which contains language that the permit superseded or replaced specific PTI conditions. As for the best available technology and lack of adequate statement of basis issues, U.S. EPA addressed these issues in a May 22, 2002 letter responding to citizen comments on Ohio EPA's Title V program. Given the pending litigation, as discussed in section I above, U.S. EPA is not making any final findings on these issues in this report.

d. Adequacy of Statement of Basis

In a December 20, 2001 letter to Ohio EPA and in the May 22, 2002 letter responding to citizen comments on Ohio EPA's Title V program, U.S. EPA addressed the adequacy of Ohio EPA's statements of basis in draft Title V permits. Given the pending litigation, as discussed in section I above, U.S. EPA is not addressing the adequacy of Ohio EPA's statements of basis in this report.

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e. Insignificant Emission Units

U.S. EPA issued a notice of deficiency (NOD) to Ohio on April 10, 2002, finding the Ohio Title V program deficient because Ohio's insignificant emission unit regulations are not consistent with Title V requirements. Ohio EPA and two industry groups, the Ohio Chamber of Commerce and the Ohio Chemistry and Technology Council, filed a petition for review of the NOD in the United States Court of Appeals for the Sixth Circuit. U.S. EPA need not initiate a withdrawal proceeding on this issue in response to the Ohio review petition because of the process outlined in the NOD and the pending litigation.

f. Acid Rain Rule Implementation

Ohio EPA promulgated the NO_x Phase II rules to complete the acid rain program as part of its Title V program. On October 2, 2002, Ohio EPA submitted these rules to U.S. EPA for review and rulemaking action.

g. Public Participation

Ohio EPA changed its Title V permit application instructions to require an entity that submits an application containing confidential business information (CBI) to also submit a non-confidential application for public review. Ohio EPA is working with the three remaining entities that submitted only applications containing CBI to obtain public versions of the applications.

2. Permitting Findings Regarding PSD Permits

a. Construction without PSD permits

U.S. EPA permitting reviewers did not identify any instances where Ohio EPA had improperly allowed a major source to commence construction without a PSD permit. The permitting reviewers did not conduct a comprehensive investigation on this issue because PSD violators are detected more effectively through enforcement activities than through the permitting process. The enforcement portion of this review addresses this issue.

b. PSD Permitting

Over the five years prior to the Draft Report, U.S. EPA reviewed the majority of draft Ohio PSD permits and at least ten percent of the synthetic minor permits, and provided comments to Ohio EPA whenever the reviewer identified a concern with the draft permit. As a result of the investigation of its files and follow-up with Ohio, U.S. EPA found that Ohio EPA was appropriately responding to U.S. EPA's comments, and was resolving U.S. EPA's concerns prior to issuance of the final PTI.

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c. *Documentation in Permit Files for Draft Synthetic Minor and PSD Permits*

U.S. EPA remains concerned that Ohio EPA maintain adequate documentation in permitting files to memorialize how it makes permitting decisions. The issue of adequate documentation by itself does not constitute evidence of failure to issue PSD permits according to the requirements of the PSD SIP.

d. *Extension of Time to Comment on Draft PSD Permits*

Ohio EPA's PSD delegation required Ohio EPA to grant an extension of time for review of and comment on a draft permit if the commenter who requested additional time demonstrated the need for the time. Ohio EPA did not grant two written requests by citizens to extend the 30-day public comment period. Under the recently approved Ohio PSD SIP, no state provision exists equivalent to the federal regulatory requirement that provides for an extension of the 30-day comment period. Nonetheless, U.S. EPA requests that Ohio EPA use its discretionary authority to allow such extensions of time in appropriate circumstances.

e. *Administrative Modifications*

U.S. EPA was concerned that Ohio EPA was making substantive changes to permits through administrative permit modifications without meeting public notice and comment requirements. U.S. EPA's review of information submitted by Ohio EPA has shown that the lack of public participation in the administrative modification process is not as widespread as U.S. EPA previously assumed, and thus U.S. EPA's concerns regarding administrative modifications have reduced significantly. However, U.S. EPA continues to call upon Ohio EPA to ensure that it will not issue through its direct final process any administrative modifications of PTIs that involve substantive changes to permit conditions.

3. Permitting Findings Regarding NSPS sources

U.S. EPA had requested information from Ohio EPA on NSPS determinations for 14 Title V permit applicants. On October 15, 2001, Ohio EPA provided information on the 14 sources that showed the sources were not subject to NSPS standards. This information resolved U.S. EPA's concerns.

4. Permitting Findings Regarding the NSR Program

In its review of Ohio's NSR program for nonattainment areas, U.S. EPA did not find any area of major permitting concerns. Since issuance of the Draft Report, the United States Court of Appeals for the Sixth Circuit vacated the decision to redesignate the Cincinnati area to

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attainment for ozone. Further review of Ohio EPA's nonattainment NSR permitting is not possible because Ohio EPA has not conducted nonattainment NSR permitting activities since the court vacated the redesignation.

5. Permitting Findings Regarding Other Matters

The air background document also discusses other issues identified by permitting reviewers in the Draft Report that were either unrelated to the withdrawal criteria, or not serious enough to provide a basis for initiating withdrawal proceedings.

D. CONCLUSION

As discussed in more detail in the air background document, U.S. EPA did not find sufficient basis to withdraw the air programs listed in the petition. Given the pending litigation in the United States Court of Appeals for the Sixth Circuit, U.S. EPA is not making final findings on issues addressed in the April 10, 2002 NOD and in the May 22, 2002 letter responding to citizen comments on Ohio EPA's Title V program.

III. CLEAN WATER ACT NPDES PROGRAM

A. INTRODUCTION

After looking into the allegations in the petition, U.S. EPA determined that the petition has not raised sufficient cause to warrant commencement of proceedings to withdraw Ohio's NPDES program.

B. FINDINGS

1. Antidegradation Requirements for Landfills

With respect to the allegations that Ohio EPA had not been complying with the State's antidegradation requirements in siting landfills, U.S. EPA did not find evidence of a widespread failure to comply with Ohio's antidegradation requirements in issuing NPDES permits; and U.S. EPA's NPDES program regulations do not address the siting of landfills.

2. Antidegradation Policies, TMDL Development and 401 Certifications

Allegations with respect to State antidegradation policies, the development of TMDLs, and CWA Section 401 Certifications would not form a basis for withdrawing the NPDES programs as those programs are not part of the NPDES program.

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3. Water Quality Guidance

Allegations pertaining to the water quality guidance did not constitute sufficient cause to commence withdrawal proceedings, as U.S. EPA had determined that Ohio had adopted requirements consistent with the Water Quality Guidance for the Great Lakes System, with the exception of whole effluent toxicity (WET), on August 4, 2000; and had specified that WET requirements apply in the Great Lakes Basin in Ohio.

4. Concentrated Animal Feeding Operations

With respect to the regulation of concentrated animal feeding operations (CAFO), Ohio EPA committed to require documented CAFO dischargers to apply for NPDES permits, to develop and issue appropriate NPDES permits for CAFOs, and to take appropriate CWA enforcement actions; and has begun the process of conducting CAFO inspections, conducting enforcement, requiring NPDES permit applications for CAFOs, and issuing NPDES permits.

5. NPDES Enforcement

U.S. EPA looked into allegations about the adequacy of Ohio EPA's NPDES enforcement program by reviewing compliance files in four separate Ohio EPA district offices. To address concerns with enforcement of NPDES violations, Ohio EPA submitted an acceptable inspection strategy; corrected problems with its Surface Water Information Management System (SWIMS); corrected problems with electronic reporting identified in the Draft Report; executed Memoranda of Agreement with each discharger that submits electronic reports requiring the permittee to maintain copies of monitoring reports on site and available during inspections; and, as indicated above, is conducting permitting of and enforcement against CAFOs.

6. WQBELs and PQLs

U.S. EPA believes that Ohio's approach for addressing WQBELs that are below the quantification level is generally consistent with federal requirements, and will continue to monitor Ohio EPA's use of PQLs, an issue not raised by the petition.

C. CONCLUSION

U.S. EPA has determined that the petition has not raised sufficient cause to warrant commencement of proceedings to withdraw Ohio's NPDES program.

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IV. RESOURCE CONSERVATION AND RECOVERY ACT PROGRAMS

A. INTRODUCTION

While both solid waste and its subset hazardous waste are regulated under the umbrella of the Resource Conservation and Recovery Act (RCRA), that statute contains different Subtitles separately governing the content, criteria and administration of hazardous waste programs and non-hazardous solid waste plans. Subtitle C of RCRA governs authorization of hazardous waste management programs; and Subtitle D governs approvals of non-hazardous solid waste management plans and non-hazardous solid waste management facility permit programs. U.S. EPA Subtitle C staff and Subtitle D staff reviewed the allegations raised with respect to the corresponding State programs based on the respective requirements and criteria and combined their findings in this report.

B. SUBTITLE C REVIEW AND FINDINGS

U.S. EPA did not find sufficient evidence to warrant initiation of withdrawal proceedings for the RCRA Subtitle C hazardous waste program. As discussed in more detail in the RCRA Background Document, U.S. EPA has conducted annual reviews of Ohio's hazardous waste permitting and enforcement programs since 1995 and has looked into the information provided by the petitioners and reviewed the comments on the Draft Report. The evidence reviewed for the period 1995 to 2000 did not present sufficient cause to warrant commencement of withdrawal proceedings under 40 C.F.R. § 271.22. Accordingly, U.S. EPA is not initiating withdrawal proceedings for Ohio EPA's RCRA Subtitle C hazardous waste program.

C. SUBTITLE D REVIEW AND FINDINGS

U.S. EPA did not find sufficient evidence to warrant the initiation of the process to withdraw the determination of MSWLF program adequacy pursuant to 40 C.F.R. Part 239. Although the petition requests that U.S. EPA withdraw its approval of Ohio's Solid Waste Management Plan, the claims in the petition were in reality a request to withdraw Ohio's MSWLF permit program, which in effect requires compliance with 42 U.S.C. § 6944(a) and 42 U.S.C. § 6945. Ohio's Solid Waste Management Plan was approved by U.S. EPA on November 14, 1985 (50 Fed. Reg. 47049, 11/14/85). U.S. EPA investigated the claims set forth in the petition by visiting the Ohio EPA's Southwest District and Headquarters offices to review facility files and conduct interviews with staff involved with the five sites specified. In addition, U.S. EPA contacted enforcement and permitting officials from the Hamilton County Department of Environmental Services (DOES) and the Regional Air Pollution Control Authority (RAPCA). Ohio EPA Headquarters and District staff as well as other regulatory officials involved in oversight and enforcement at the facilities were contacted and interviewed. U.S. EPA determined that there is not substantive information sufficient to indicate that the current Ohio

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MSWLF permit program does not meet the minimum Federal requirements for an adequate program under § 4005(c)(1)(C) of RCRA, 42 U.S.C. § 6945(c)(1)(C). Therefore, U.S. EPA is not initiating proceedings to withdraw its approval of Ohio EPA's MSWLF program.

D. CONCLUSION

U.S. EPA found no grounds upon which to initiate withdrawal proceedings for either RCRA program.

V. ENFORCEMENT OFFICES

In addition to reviewing the various Ohio programs mentioned in the petition, U.S. EPA reviewed the activities of the State legal offices that pursue enforcement on behalf of the Ohio EPA program offices: the Ohio EPA Office of Legal Services and, in the Office of the Ohio Attorney General, its Environmental Enforcement Section and its Bureau of Criminal Identification and Investigation. U.S. EPA reviewed the functioning of those enforcement offices to cover the full range of program implementation activities. In its Draft Report, U.S. EPA preliminarily concluded that once a determination was made to pursue enforcement on behalf of the various programs, the legal offices followed through and acted pursuant to their authorities to enforce the matters before them; and that they initiate, litigate (or prosecute) and conclude a significant number of enforcement cases. In many cases, they obtained settlements with significant penalties. U.S. EPA found that Ohio EPA has pursued enforcement, within the bounds of its authorities, in a significant number of cases and that a significant number of cases which Ohio EPA could not resolve at its level have been referred to and prosecuted by the Ohio Attorney General's Office. U.S. EPA also found that the Ohio criminal environmental enforcement program was strong. As discussed in the Draft Report, the lack of a multi-media approach does not affect authorization, delegation and/or approval of the federal environmental programs, which are media specific. U.S. EPA's conclusions in this regard have not changed from the Draft Report made public on September 4, 2001. Moreover, U.S. EPA was pleased by the enforcement achievements and efforts described in Ohio EPA's Summary of 2001 Enforcement Performance. Ohio maintains an active environmental enforcement presence. In its review of the Ohio enforcement offices, U.S. EPA did not find a basis for withdrawal of programs.

VI. SUMMARY

Based on the evidence reviewed for the period 1995-2000, U.S. EPA did not find sufficient basis to initiate withdrawal proceedings based on the implementation allegations in the petition.